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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1490

HOWARD MANUFACTURING COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

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March 17, 1971

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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Petitioner,

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NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Eighth Circuit

The Petitioner Howard Manufacturing Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 9, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, pp. A-1–A-3. The decision and order of the National Labor Relations Board is reported in 180 N.L.R.B. No. 47 and set forth in the Appendix, pp. A-6–A-15.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1971. A timely petition for rehearing was denied on February 5, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

1. Whether, in the application of this Court's rationale in **N.L.R.B. v. Gissel Packing Co., Inc.**, 395 U.S. 575 (1969), the Court of Appeals for the Eighth Circuit erred in enforcing a card-based bargaining order of the National Labor Relations Board against the petitioner for violation of 29 U.S.C., § 158(a)(5) in the absence of the Board's receiving evidence that at the time of the bargaining order's issuance nearly two and one-half years after the representation election, it was improbable that a fair rerun election could be conducted.

STATUTORY PROVISION INVOLVED

United States Code, Title 29:

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

STATEMENT OF THE CASE

1. Proceedings Before the National Labor Relations Board

The Petitioner, Howard Manufacturing Company, Inc., operates a small men's wear garment plant in Nashville, Arkansas. On June 12, 1967, the Amalgamated Clothing Workers' Union demanded to be recognized as the collective bargaining representative of the Company's production and maintenance employees. The Union claimed that a majority of Howard's employees had signed authorization cards designating it as their bargaining representative. Following the Company's declining to voluntarily extend recognition to the Union, the National Labor Relations Board conducted a representation election on August 25, 1967. In this election, the Union received 57 votes, while 75 votes were cast against the Union. Failing to receive a majority of the votes, the Union was not certified as the employees' collective bargaining representative as a result of the election.

Thereafter, the Union filed objections to the conduct of the election and unfair labor practice charges alleging that the Company unlawfully refused to recognize and bargain with the Union as a result of its card-based bargaining demand prior to the election.

It was not until December 16, 1969, following the Supreme Court's decision in **N.L.R.B. v. Gissel Packing Co.**, *supra*, that the Board issued its decision and order setting aside the results of the election and placed the Company under a bargaining order on the grounds that the Company's pre-election unfair labor practices had dissipated the Union's majority status so as to make it improbable that a fair rerun election could be conducted.

2. The Decision of the Court of Appeals

The Court of Appeals for the Eighth Circuit affirmed the Board's decision and order. A copy of its opinion is contained in the Appendix, pp. A-1–A-3.

After submission of the instant appeal to the Eighth Circuit for decision, the Supreme Court denied petitions by the Board for writs of certiorari to the Courts of Appeal for the Fifth and Sixth Circuits in similar bargaining order cases requiring interpretation of the **Gissel** opinion. **N.L.R.B. v. American Cable Systems, Inc.**, 427 F.2d 446 (5th Cir. 1970), cert. denied, 39 U.S.L.W. 3257 (Dec. 14, 1970); **Clark's Gamble Corp. v. N.L.R.B.**, 422 F.2d 845 (6th Cir. 1970), cert. denied, 39 U.S.L.W. 3163 (Oct. 20, 1970). The Fifth and Sixth Circuits refused to enforce the Board's bargaining orders and remanded both cases to the Board for consideration of the limited question of the present necessity for a bargaining order in light of changed circumstances due to the passage of time which might now permit the holding of a fair rerun election without contamination by the employers' old unfair labor practices.

Thereafter, Howard Manufacturing Company petitioned the Eighth Circuit for a rehearing on the basis of the **American Cable** and **Clark's Gamble** decisions from the Fifth and Sixth Circuits, respectively. The Howard Company likewise maintained that because of changed circumstances occasioned by the passage of time resulting from the Board's own delay, it should not be placed under a bargaining order in 1971, based on union authorization cards secured in 1967, unless at the time of enforcement of this order, the Board still finds that the electoral atmosphere at Howard's plant is such that a fair rerun election could not now be conducted.

The petition for rehearing, Appendix pp. A-16–A-20, was denied by order of the Eighth Circuit without assignment of reasons, Appendix, p. A-20.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of the Supreme Court's Decision in N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969) in the Application of 29 U.S.C., § 158(a)(5).

The effect of the Eighth Circuit's opinion in this case is to place the Howard Company under an immediate bargaining order without first remanding the issue of the present appropriateness of this remedy to the Board in light of changed circumstances involving its employees which have transpired during the past four years of litigation.

The Eighth Circuit's opinion also ignores the fact that the law the Eighth Circuit applied to this case in 1971 was not the same law on which the case was tried and decided by the Board's Trial Examiner. When this case was decided by the Trial Examiner on October 27, 1968, the Trial Examiner followed the Board's doctrine of **Joy Silk Mills, Inc. v. N.L.R.B.**, 85 NLRB 1263 (1949), enforced 185 F.2d 732 (D.C. Cir. 1950). The Trial Examiner's opinion held that the Company unlawfully refused to recognize the Union because it did not have a good faith doubt of the Union's claim of majority status.

When the instant case reached the Board for review, the Board deliberately delayed its decision until December 16, 1969, while awaiting the Supreme Court's **Gissel** decision rendered June 16, 1969, changing the law in this area. In **Gissel**, *supra* at 594, the Supreme Court observed that the Board had now abandoned its practice of ascertaining an employer's good faith doubt under the **Joy Silk** doctrine, but now deemed, and the Court so held, that "the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the elec-

tion processes and tend to preclude the holding of a fair election.''

The Eighth Circuit perfunctorily reviewed and affirmed in a *per curiam* opinion the Board's bargaining order grounded on the conclusionary language of the new bargaining order test of the **Gissel** case. In its abbreviated opinion and order denying the petition for a rehearing, the Eighth Circuit failed to consider that during the evolution of the **Gissel** doctrine, employers with pending cases before the Board such as the Howard Company, had experienced substantial routine employee turnover and other changed circumstances due to the passage of time. By its silence, the Eighth Circuit has taken the position, contrary to the Fifth and Sixth Circuits, that regardless of such changes as substantial turnover of the employer's personnel during the period the Board delayed its rulings anticipating a change in the law, these intervening factors should have no bearing on the question of whether a bargaining order is still presently necessary to cure the effects of old unfair labor practices which occurred four years previous or whether, on balance, a fair rerun election could now be conducted.

The Fifth Circuit in **N.L.R.B. v. American Cable System, Inc.**, 427 F.2d 446 (5th Cir. 1970), cert. denied 39 U.S.L.W., 3257 (Dec. 14, 1970), has reached just the contrary result in its interpretation of **Gissel**. In that case, as here, there were the similar circumstances of the Circuit Court reviewing the enforcement of a bargaining order in 1970 on the basis of unfair labor practices committed in 1965 when, during the interim, there had been a substantial turnover in the affected employees. In interpreting **Gissel**, the Fifth Circuit held, *supra* at 448-449:

> In **Gissel** the Court made it plain that a bargaining order issued on the basis of a card majority is not the preferred method of establishing a union's repre-

sentative status and that such an order should be issued only when in the Board's judgment 'the possibility of . . . ensuring a fair election . . . by the use of traditional remedies, though present, is slight. . . .' 395 U.S. at 614.

* * * * * * * *

We think it clear from the foregoing that the Court in **Gissel** clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election.

In the instant case the Board made no such finding before it issued the December 3, 1969, bargaining order which we are here asked to enforce. Instead, on remand the Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the Company's 1965 waywardness. We deem such findings insufficient under the teachings of **Gissel** to justify a 1970 bargaining order. **Gissel** does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity—a present view, albeit with an historical prospective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently septic for an election. On the other hand, if the employer's 1965 violations of §8(a)(1) and (3) have a 1970 existence, **Gissel** commands the issuance of a bargaining order. Since the Board did not address itself to this question, we must again remand for further findings as to the present necessity for a bargaining order.

The Sixth Circuit in **Clark's Gamble Corp. v. N.L.R.B.**, 422 F.2d 845 (6th Cir. 1970), cert. denied, 39 U.S.L.W. 3163 (Oct. 20, 1970), has also held, contrary to the Eighth Circuit, that in applying the teachings of **Gissel**, a card-based bargaining order should be remanded to the Board

for consideration of the extent of employee turnover and the likelihood presently of holding a fair rerun election following a delay of two years by the Board and its Trial Examiner in their decision of the case.

Refusing to enforce the Board's bargaining order, the Sixth Circuit instructed the Board to ascertain the extent to which there may have been a change in the identity of the employees comprising the bargaining unit since the time of the original bargaining demand. The Sixth Circuit reasoned that the Board's delay of two years in deciding the refusal to bargain charge removed the case from **Gissel's** contemplation. The Court was concerned that such a prejudicial delay in processing the litigation had more than likely resulted in a substantial change in the employees who would be affected by the bargaining order and indicated this factor should be weighed by the Board along with any residual effects of the unfair labor practices in deciding whether a bargaining order as opposed to another election was presently necessary.

The Supreme Court denied the Board's petitions for writs of certiorari seeking review of the Fifth and Sixth Circuits' decisions in both the **American Cable** and **Clark's Gamble** cases.

In the case at bar, the Union, Trial Examiner, and Board delayed over two years in the filing, prosecution, and decision of the refusal to bargain charge before the Board finally imposed a bargaining order remedy. During the interim, there has been a substantial turnover in the Howard Company's employees. Nevertheless, the Eighth Circuit denied the Company's petition for rehearing specifically seeking a remand to the Board to consider whether the extent of this employee turnover coupled with other changed circumstances now made it possible to conduct a fair rerun election. In the strikingly similar **American Cable** and **Clark's Gamble** cases, the Fifth and Sixth Cir-

cuits have remanded these cases to the Board for this purpose rather than pursuing the course of the Eighth Circuit of immediately affirming the Board's stale bargaining order without further proceedings before the Board.

Consequently, the industrial relations of employers and employees in the Eighth Circuit are being administered differently than the relationships of employers and employees in the Fifth and Sixth Circuits by virtue of a non-uniform interpretation of the Supreme Court's bargaining-order versus rerun-election test as decided by **Gissel.**

CONCLUSION

It is essential to the Congressional intent for uniform administration of the National Labor Relations Act that the Supreme Court resolve this conflict of interpretations among the Circuits of the Court's opinion in **N.L.R.B. v. Gissel Packing Co., Inc.**, *supra*, with the resulting disparity of treatment. For this reason, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted

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Counsel for Petitioner

March 17, 1971.

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 20,068

Howard Manufacturing Company, Inc., Petitioner, v. National Labor Relations Board, Respondent.	On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

[January 4, 1971.]

Before Matthes, Chief Judge, Gibson and Lay, Circuit Judges.

Per Curiam.

The National Labor Relations Board seeks enforcement of its bargaining order entered upon findings of unfair labor practices in violation of §§ 8(a)(1) and 8(a)(5) and (1) of the National Labor Relations Act. We grant enforcement.

We find substantial evidence in the record as a whole to support the Board's determination that by June 12, 1967, the date of the demand for recognition as bargaining

representative, the union[1] possessed a sufficient number of employee authorization cards to give it majority status. At this time the company alleged a good faith doubt as to the union's majority and requested an election, which was held on August 25, 1967. The union lost by a vote of 75 to 57. The union thereafter filed objections to the election, but a hearing was not held because on January 3, 1968, the union filed the present 8(a)(1) and 8(a)(5) charges. The Board found that from July 3, 1967, to the date of the election the company engaged in pervasive unfair practices in violation of 8(a)(1) of the Act which effectively undermined the employees' sentiment for the union and impeded a fair election process. Upon a review of the record as a whole, we find substantial evidence to support these findings and to justify the issuance of an 8(a)(5) bargaining order. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Noll Motors, Inc.*, ... F.2d ... (No. 19,572) (8 Cir. 1970).

On this appeal the company asserts that any 8(a)(5) violation must relate to the date of June 12, 1967, when the union made its demand known to the company to act as bargaining representative. The company claims that Section 10(b) of the Act[2] serves as a bar to the 8(a)(5) charge and the bargaining order since the union filed its unfair practice charges on January 3, 1968, more than six months after the company's refusal to bargain. The 8(a)(5) charge is premised, however, not on the June 12, 1967, company refusal to accede to the union's demand for recognition. At that time the company was entitled to an

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[1] The union involved is the Southwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO.

[2] Section 10(b) reads in part:

"*Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C.A. § 160(b).

election regardless of its subjective motivation in requesting one. See *NLRB v. Gissel Packing Co.*, supra. As the *Gissel* decision points up, the bargaining order arises because of the company's subsequent misconduct in unfairly undermining the union's majority status. These unfair practices and the defeat of the union at the election all occurred within six months of the time of the filing of the charge with the Board. The Company likewise urges that there exists no evidence of a "continuing demand" for recognition after June 12, 1967. This court's decision in *NLRB v. Arkansas Grain Corp.*, 390 F.2d 824 (8 Cir. 1968), is clearly distinguishable. There, in a pre-*Gissel* ruling, we rejected a finding of an 8(a)(5) violation based upon the company's alleged lack of good faith in refusing to bargain. We did so because there was no competent proof that the union possessed a majority status at the time of its original demand for recognition. More important here, however, is the fact that a "continuing demand" is no longer relevant where the charge rests upon unfair practices occurring within six months of the charge; and the Board has further found the company's conduct to have so undermined union sentiment as to make the possibility of a fair rerun election slight. *NLRB v. Gissel Packing Co.*, supra. Cf. *International Union United Auto, Aerospace & Agr. Implement Workers of America, AFL-CIO v. NLRB*, 363 F.2d 702 (D. C. Cir. 1966), cert. denied 385 U.S. 973 (1966).

Finding no bar under § 10(b) of the Act and determining that substantial evidence on the record as a whole supports the Board's findings, we grant enforcement of the Board's order.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
For the Eighth Circuit

Howard Manufacturing Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

No. 20,068.

Judgment

Before: Matthes, Chief Judge, Gibson and Lay, Circuit Judges.

This Cause came on to be heard upon the petition of Howard Manufacturing Company, to review the order of the National Labor Relations Board of December 16, 1969, against Petitioner, its officers, agents, successors, and assigns, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard respective counsel on October 12, 1970, and has considered the briefs and transcript filed in this cause. On January 4, 1971, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith it is hereby

Ordered and Adjudged by the United States Court of Appeals for the Eighth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioner, Howard Manufacturing Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

February 9, 1971

Costs taxed in favor of the National Labor Relations Board:

Printing Brief of NLRB $213.10

Total costs of Labor Board $213.10
for recovery from Petitioner,
Howard Manufacturing Company.

APPENDIX B

180 NLRB No. 47 — Nashville, Ark.
D-3484

United States of America
Before the National Labor Relations Board

Howard Manufacturing Company, Inc.

and — Cases

Southwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO. — 26-CA-2965, 26-RC-2957

DECISION AND ORDER

On October 27, 1968, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that certain of the Union's objections to the election in Case 26-RC-2957 should be sustained and recommended that a bargaining order be issued. Thereafter, the General Counsel, the Respondent, and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs. The General Counsel also filed an answering brief to Respondent's exceptions, and the Respondent filed a brief answering the General Counsel's and Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National

Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only to the extent consistent herewith.

Following a stipulation for consent election, a Board-conducted election was held August 25, 1967, in which the Petitioner, Southwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, failed to receive a majority of the valid ballots cast. The Petitioner, thereafter, filed timely objections to conduct affecting the results of the election, and after investigation thereof by the Acting Regional Director, he issued and served on the parties his Report on Objections. The Regional Director recommended that all the objections, except 4 and 7, be overruled and that objections 4 and 7 be sustained; that the election be set aside and a new one directed. Alternatively, he recommended a hearing to resolve issues raised by objections 2, 4, 5 and 7, and the Board so duly ordered.

Pursuant to charges of 8(a)(1) and (5) violations filed by the Union on January 3, 1968, a complaint issued in Case 26-CA-2965 which was thereafter consolidated with the representation proceeding 26-RC-2957. It is these cases which are now before us.

1. The Trial Examiner found that a notice of leave of absence policy posted by Respondent on its bulletin board on June 28, 1967, prior to the Board-conducted election of August 25, 1967, violated Section 8(a)(1) of the Act. The Trial Examiner, however, failed to note that the charge initiating the unfair labor practice proceeding was

filed on January 3, 1968, more than 6 months after the notice was posted. Since Section 10(b) of the Act prohibits the issuance of a complaint based upon unfair labor practices occurring more than 6 months before the filing and service of the charge, it is evident that the notice of leave of absence policy cannot be found to have violated Section 8(a)(1). Similarly, since the subsequent restoration of seniority rights to an employee during the 10(b) period was inescapably grounded in the prior notice of leave of absence policy which was posted before the limitation period, we also find, contrary to the Trial Examiner, that it cannot be found to constitute a violation of Section 8(a)(1).[1] On the other hand, we agree with the Trial Examiner, for the reasons stated by him, that Respondent's conduct in posting the notice of leave of absence policy on its bulletin board constituted objectionable conduct and affected the results of the election.

2. In section III, subsection **Fourth** of the Trial Examiner's Decision, the Trial Examiner found that employees were deprived of their right to a free choice of bargaining representative, and that the rights guaranteed under Section 7 of the Act were interfered with, by the nature of Respondent's references to the Union in its letters and speeches. We do not agree. In the earlier stages of the instant objections proceeding, the Regional Director considered the content of the campaign material alleged to have been improper, and found the objections based thereon to be without merit. In the absence of exceptions to the Regional Director's dismissal of these objections, the Board sustained the Regional Director's action. The Respondent's campaign material was not alleged in the complaint to be violative of Section 8(a)(1) and no evidence supporting such violation was taken at the hearing. Accordingly, we agree with the Respondent that to find

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[1] See *Durfee's Television Cable Company*, 174 NLRB No. 98.

such campaign material at this stage of the proceeding either objectionable or illegal would be an abridgment of its procedural rights, and therefore do not adopt the Trial Examiner's findings in this regard.

3. Section III, subsection **Fifth** of the Trial Examiner's Decision: Like the Trial Examiner, we find that Supervisor Moore's questioning of employee Haislip in the cafeteria as to "why [she] wanted a union," in the circumstances detailed by the Trial Examiner, constituted objectionable conduct. However, as noted by the Trial Examiner, there is insufficient proof that this incident occurred after July 3, 1967, the 10(b) cutoff date, as opposed to June 28 or 29, 1967. Accordingly, we adopt his finding that the incident cannot be found to have constituted a violation of Section 8(a)(1).

4. We agree with the Trial Examiner that Supervisor Dixon's interrogation of employee White concerning the Union, as described in section III, subsection **Sixth** of his Decision, was both violative of Section 8(a)(1) and conduct interfering with the results of the election. However, we do not adopt the Trial Examiner's finding that White's request to Hudson to "vote no for me" was a further violation of the Act, or objectionable.

5. We do not agree with the Trial Examiner's findings in section III, subsection **Seventh**, paragraphs numbered 1 and 9, that President Herzog by his statements to employees Carrigan and Tipton, respectively, that (a) "the union can cause trouble and was a pack of headaches" and (b) the union took (the employees') money and couldn't give them anything, violated Section 8(a)(1) of the Act. On the contrary, we find that these remarks were in the permissible area of fair comment and did not violate Section 8(a)(1).

In agreement with the Trial Examiner, as set forth in the remaining paragraphs of subsection **Seventh** of his

Decision, we find that Respondent violated Section 8(a)(1) by the remarks detailed therein.[2]

6. The Trial Examiner found that Respondent's supervisors on June 20 and 21 engaged in surveillance of its employees who accepted the Union's literature. He found further that, on August 14, 1968, Respondent engaged in handbilling near the location being used by the Union for the same activity, thereby deterring employees from accepting such literature, in violation of Section 8(a)(1). The Trial Examiner also found that this conduct affected the results of the election.

We deem it unnecessary to pass on whether Respondent's foregoing activities constituted objectionable conduct, inasmuch as sufficient findings of objectionable conduct have already been made and additional findings would merely be cumulative. Moreover, we do not reach the issue of whether Respondent's conduct of August 14 violated Section 8(a)(1), since, at the hearing, both the General Counsel and the Charging Party disavowed alleging this activity as unlawful. As the Trial Examiner noted, Respondent's conduct of June 20 and 21 cannot be found to have violated Section 8(a)(1), since Section 10(b) precludes our finding unlawful any conduct by Respondent occurring before July 3, 1968.

7. We agree with the Trial Examiner that by June 12, 1967, the initial date of the Union's demand for recognition, the Union had been designated for the purposes of

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[2] Member Zagoria, for the reasons set forth in his dissent in *Graber Manufacturing Co., Inc.*, 158 NLRB 244, would not find president Herzog's remark to Carrigan, concerning the presentation of future grievances through the union, a violation of Section 8(a)(1); neither would he find Herzog's remarks to Butler, detailed in section III, subsection *Seventh*, paragraph numbered 12, to be violative of the Act. Chairman McCulloch would not find that Herzog's question to Carrigan, set forth in paragraph numbered 4 of section III, subsection *Seventh*, constituted unlawful interrogation.

collective bargaining by a majority of Respondent's employees in an appropriate unit, and that Respondent violated Section 8(a)(5) by thereafter refusing to bargain with it.

The record reveals that, for the payroll period from June 9 through June 23, 1967, there were 153 eligible employees in the unit and that as of June 16 the Union was in possession of 85 validly signed cards. In arriving at this figure we accept the Trial Examiner's findings that employees Hutson, Tipton, Butler and Haislip signed their cards free of any misrepresentation by the Union as to the card's purpose. We also accept the Trial Examiner's finding that employee Carrigan's card, signed by another at her direction, was a valid designation of the Union as bargaining representative. We accept the Trial Examiner's finding that employee Coulter's card was valid for determining the Union's majority status, but we do so on the ground that the evidence taken at the hearing was sufficient to establish its validity without regard to the Trial Examiner's handwriting analysis. We accept the Trial Examiner's findings with regard to the validity of employee Hile's card.

Respondent contends that employee Tollet's card is invalid, because of a representation made by the Union that the card did not obligate Tollett in any way. We find it unnecessary to reach this issue, or to count Tollett's card, in view of the Union's clear majority status based on the cards of other employees.

We agree further with the Trial Examiner that, as of July 3, 1967, the Union had been designated as bargaining representative by 92 valid cards from employees in the unit. The record reveals that the total number of eligible employees in the appropriate unit for the June 23 through July 6 payroll period was 154. Thus the number of validly signed cards in the Union's possession was greatly in excess of the number necessary to constitute a majority.

In reaching this conclusion we accept the Trial Examiner's findings that the cards of employees Henderson and Wesson were valid because testimony taken at the hearing established that the witness saw these employees sign their cards at a union meeting on June 22.

We have found, in agreement with the Trial Examiner, that on and after June 12, 1967, the date of the Union's formal demand for recognition, the Union had been designated by a majority of employees in an appropriate unit to act as their collective-bargaining representative. The Union filed a petition for an election on June 16, 1967. Thereafter, as found by the Trial Examiner and affirmed substantially herein, Respondent engaged in numerous unfair labor practices, including interrogations, threats of reprisal, and a statement indicating that selection of the Union would be futile. In these circumstances, we believe it unlikely that any election conducted would be an accurate gauge of the employees' true desires, and find that, on balance, employees' desires as expressed through the authorization cards previously signed would be better protected by a bargaining order than by another election.

Respondent contends that, since the Union's formal request for recognition and Respondent's letter of June 16, 1967, denying that request, occurred before the 10(b) cutoff date of July 3, 1967, any 8(a)(5) finding is barred by the limitation of Section 10(b). We do not agree. As we have found, the Union retained its majority through July 3, 1967, the beginning of the 10(b) period. Though the Union's initial request for recognition came on a date prior to this, on June 16, 1967, the Union filed a representation petition shortly thereafter indicating its continuing interest in representing the Respondent's employees. We construe the Union's demand of June 16 to have been a continuing one; in the light of Respondent's peremptory refusal to bargain on June 16, and its subsequent unfair

labor practices, any further demand by the Union for recognition would have been futile

Moreover, under the Supreme Court's decision in the *Gissel Packing Co.* case,[3] it is the Employer's contemporaneous and subsequent conduct which determines whether its earlier refusal to bargain was unlawful. Since it is these unfair labor practices which serve as the basis for an 8(a)(5) finding under *Gissel,* we can hardly say that the 10(b) period started running before the unfair labor practices were committed; i. e., before the unlawful refusal to bargain was established. As the Court of Appeals for the District of Columbia Circuit has indicated in a similar case, Respondent's active and unlawful antiunion campaign within the 10(b) period constituted a "continuing offense," a repetition of its earlier refusal to bargain.[4] Hence, we find the Respondent violated Section 8 (a)(5) of the Act by refusing to bargain with the Union on and after July 3, 1967, and that such a finding is not barred by Section 10(b) of the Act. We shall issue a bargaining order.[5]

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Howard Manufacturing Company, Inc., Nashville, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Southwest Regional Joint Board, Amalgamated

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[3] *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575.

[4] See *U.A.W. v. N.L.R.B. (Acro Corp.),* 363 F.2d 702 (C.A. D.C.), cert. denied 385 U.S. 973.

[5] We find no warrant for the 90-day proof-of-majority requirement imposed by the Trial Examiner and do not adopt it.

Clothing Workers of America, AFL-CIO, the exclusive representative of the employees in the appropriate unit as set forth below.

(b) Coercively interrogating employees about the Union in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

(c) Threatening employees, expressly or implicitly, that they may suffer reprisals for having engaged in union activities.

(d) Indicating that selection of a bargaining representative will be futile.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Southwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, and to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with Southwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO, as the exclusive bargaining representative of all its employees in the appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All employees employed by Howard Manufacturing Company, Inc., including all production and maintenance

employees, excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its Nashville, Arkansas, plant, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 26, after being signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

It Is Further Ordered that the election held on August 25, 1967, be vacated and set aside and that the petition in Case 26-RC-2957 be dismissed.

It Is Further Ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein.

Dated, Washington, D.C.

.....
Frank W. McCulloch, Chairman

.....
Howard Jenkins, Jr., Member

.....
Sam Zagoria, Member
National Labor Relations Board

(Seal)

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 20,068

Howard Manufacturing Company, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

PETITION FOR REHEARING

Howard Manufacturing Company, Inc., respectfully petitions the Court for rehearing to reconsider the order entered in this case by a panel of this Court on January 4, 1971.

The Opinion of the Court

In its opinion and order, the Court sustained the decision of the National Labor Relations Board which found (1) that prior to a N. L. R. B. representation election conducted on August 27, 1967, the Howard Manufacturing Company, Inc. committed pervasive unfair labor practices in violation of § 8(a)(1) of the National Labor Relations Act which effectively undermined its employees' sentiment for the Union and impeded a fair election in which the Union failed to receive a majority of the votes cast and (2) that these findings of § 8(a)(1) violation justified the issuance of a § 8(a)(5) bargaining order under the rationale of *N. L. R. B. v. Gissel Packing Co.*, 395 U. S. 575

(1969) because the possibility of a fair rerun election was slight.

The Court affirmed the Board's cross-application for enforcement of its order which, among other things, will require the Company to bargain collectively with the Union.

Question Presented for Reconsideration

1. Whether the Court, by ordering enforcement of the bargaining order, gave consideration to the recently decided case of *N. L. R. B. v. American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir. 1970), referred to during oral argument, which held that the United States Supreme Court in *Gissel, supra,* clearly contemplated that no bargaining order should be issued unless at the time the Board issues such an order it still finds that the electoral atmosphere is unlikely to produce a fair election when the unfair labor practices on which the order is based were committed several years previous. At the time the instant case was orally argued before this Court, the Board was in the process of applying for a writ of certiorari to the United States Supreme Court for review of the Fifth Circuit's decision in *American Cable.* In December, 1970, the Supreme Court denied certiorari leaving stand the Fifth Circuit's interpretation of the *Gissel* criterion for a bargaining order based on a majority of union cards acquired several years before issuance of the order. *N. L. R. B. v. American Cable Systems, Inc.,* ... U. S. ... (December, 1970).

Statement

In the *American Cable* case, the employer had committed unfair labor practices in 1965 prior to the representation election. Upon remand by the Fifth Circuit to the Board on the first appeal, the Court instructed the Board to reconsider its issuance of a bargaining order in light of the teachings of *Gissel* which apparently had been decided after the Board's first decision. On remand, the Board in

its redetermination of December 3, 1969, upholding the card-based bargaining order, refused to consider the employer's contention that since the election an intervening employee turnover and a change in one of the supervisors who was involved in the prior unfair labor practices now made it possible for a fair rerun election to be conducted.

In refusing to enforce the Board's order and remanding again upon a second appeal, the Fifth Circuit held that under the teachings of *Gissel*, on remand the first time, "the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified," *supra* at *448*.

The Court further pointed out that 1965 unfair labor practice findings were insufficient to justify a 1970 bargaining order because industrial democracy should command a view towards the present rather than the past.

The instant case presents almost an identical set of circumstances as *American Cable*, and, for the same reasons, the petitioner submits that this case should be remanded to the Board for at least the limited issue of reconsideration of the extraordinary bargaining order remedy in light of changed circumstances. Here, the unfair labor practices occurred during the period from July 3, 1967, until August 27, 1967, as found by the Board. However, the Board's decision imposing a bargaining order was not rendered until December 16, 1969. That decision, purportedly premised on *Gissel*, failed to make any findings with respect to whether the unfair labor practices which occurred nearly two and one-half years before still polluted the electoral atmosphere so as to preclude the holding of a fair rerun election. Similarly, as in *American Cable*, the Board's decision in the instant case contained only a recitation of the conclusionary language of *Gissel* as its sole basis for the issuance of bargaining order.

If the Petitioner were permitted to show the changed circumstances on remand, there would likewise be evidence that there has been a drastic turnover in the Petitioner's personnel, that not a single unfair labor practice has occurred at Petitioner's plant during the past three and one-half years, and a major change in supervision has transpired since the unfair labor practices occurred during the campaign preceding the election. Consequently, a 1971 bargaining order should not be based on 1967 unfair labor practices. It is undemocratic to now order not only the Petitioner, but also its employees, to recognize a collective bargaining representative for whom the large majority have never expressed any preference if there exists at this time the likelihood of holding a fair rerun election. On remand, the Board may find that the necessary "laboratory conditions" for a fair election still do not exist and reaffirm its bargaining order remedy. But, in doing so, the Company and the present complement of employees will have at least been afforded their procedural due process before deciding this serious question of whether a rerun election could now be conducted in an atmosphere which would accurately reflect the employees' sentiments towards collective representation. Otherwise, the rights of the work force at the plant today have been totally disenfranchised by an industrial relations' philosophy premised on the anachronism that the sins of a past generation should be visited upon the present.

In another case of the Sixth Circuit, *N. L. R. B. v. Clark's Gamble Corp.*, 422 F. 2d 845 (6th Cir. 1970), which the Supreme Court also just recently denied the Board's petition for a writ of certiorari, ... U. S. ..., 39 USLW 3163 (October 20, 1970), that Court ordered the Board to reconsider its bargaining order remedy due to the extreme delay between the Union's demand for recognition and the Board's decision which was occasioned by the Board's own procrastination. In the words of the Court, *supra* at 846:

> The Trial Examiner did not issue his decision until nearly a year after the filing of the charge, and it then took the Board almost another full year to issue its order. We were and are concerned whether we are, and have been since the Board's order dealing with substantially the same body of employees identified on the pay roster of December 22, 1964.

Again, in the instant case, it has been the Board's delay and not the Petitioner's which has resulted in the substantial intervening turnover in the Petitioner's personnel. However, if the bargaining order is not remanded for reconsideration in light of present circumstances, it will be the Petitioner and all of its present employees who will be penalized by the Board's inordinate delay.

Conclusion

Therefore, Petitioner respectfully requests the Court to reconsider its decision in view of the Fifth Circuit's well-reasoned interpretation of the *Gissel* doctrine in *American Cable* under facts similar to those of the instant case. Petitioner urges the Eighth Circuit to follow this decision and remand the present case to the Board for reconsideration of the prevailing electoral atmosphere before enforcing the Board's issuance of a bargaining order.

Respectfully submitted

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JAMES W. MOORE
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Little Rock, Arkansas 72201
Attorneys for Petitioner
Howard Manufacturing
Company, Inc.

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 20068 September Term, 1970

Howard Manufacturing Company, Petitioner,
vs.
National Labor Relations Board, Respondent.

On Petition for Review of Order of the National Labor Relations Board.

Petition of petitioner for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 5, 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1490

HOWARD MANUFACTURING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The issue raised by the petition is whether the Board may properly disregard the effect of post-election employee turnover in determining whether an employer's pre-election unfair labor practices preclude the holding of a fair representation election and warrant a bargaining order. Since petitioner did not raise that issue before the Board, however, judicial review thereof is precluded by Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).[1] See *Marshall Field*

[1] Indeed, petitioner did not even raise the issue in the court of appeals until after the latter had rendered its decision sustaining the Board (see Pet. App. A16-A20).

and Co. v. *National Labor Relations Board,* 318 U.S. 253, 255; *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 350.

In any event, the Board believes that the court of appeals correctly decided this case. See *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 610-611. The basic question presented in this case is the same as that involved in the conflicting decisions among panels of the Fifth and Sixth Circuits which this Court has been asked to review this Term. See, *e.g.,* the Board's petitions in *National Labor Relations Board* v. *Clark's Gamble Corporation,* No. 265, this Term, certiorari denied, 400 U.S. 868, and *National Labor Relations Board* v. *American Cable Systems, Inc.,* No. 737, this Term, certiorari denied, 400 U.S. 957,[2] and the company petitions in *American Art Industries, Inc.* v. *National Labor Relations Board,* No. 995, this Term, certiorari denied, February 22, 1971, and *G.P.D., Inc.* v. *National Labor Relations Board,* No. 1169, this Term, certiorari denied, March 22, 1971. While the Board agrees with petitioner that this conflict in decisions should be resolved by this Court, presumably the same considerations which led the Court to deny the previous petitions would also lead it to deny this petition, even if the issue had been properly raised below.

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[2] In *American Cable,* in addition to employee turnover between the unfair labor practice and the Board's bargaining order, there was also the fact that the management official who had committed the unfair labor practices had subsequently left the company.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

APRIL 1971

☆ U.S. Government Printing Office: 1971—421-216/557